In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-332

CHARLES LAURENT FIOCCONI
and JEAN CLAUDE KELLA, PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In November 1969, petitioners, citizens of France, were indicted in the United States District Court for the District of Massachusetts for having conspired from September 1968 to April 1969 to import heroin into the United States in violation of 21 U.S.C. (1964 ed.) 174. Bench warrants were issued but could not be executed. Interpol found petitioners in Italy and Italian authorities arrested them there in August 1970. A month later the United States Embassy in Rome requested petitioners' extradition. Although the Extradition Convention between the two governments (15 Stat. 629, as amended) does not include narcotics

offenses, the Embassy sought extradition as an exercise of comity since the Convention does not preclude extradition for narcotics offenses and since petitioners' acts, as alleged in the indictment, would be crimes under Italian law. After appropriate proceedings, a court in Florence directed petitioners' extradition for the purpose of standing trial on the Massachusetts charges. (Pet. App. 5a-6a.)

After being removed to Boston on October 6, 1971, petitioners pleaded not guilty. Bail was fixed at $250,000 each, which was met by a surety bond secured by a certified check for $500,000 drawn on a Swiss bank. Shortly after their release on bail, petitioners were subpoenaed to appear before a federal grand jury in the Southern District of New York. When they appeared they were arrested on warrants issued under an indictment returned the same day, which charged them with a substantive crime involving the sale and concealment of heroin on May 27, 1970. Bail was fixed at $100,000 each, which petitioners were unable to post. Subsequently, the grand jury returned a superseding indictment charging petitioners and twenty-one others with having conspired to violate the narcotics laws from January 1970 to January 1972 (the date of the indictment), and with two substantive offenses in May 1970. Bail was again set at $100,000, which petitioners were unable to meet. (Pet. App. 6a-7a.)

Petitioners then sought a writ of habeas corpus from the United States District Court for the Southern District of New York, contending that their detention there on a charge other than the one for which they had been extradited was an act of bad faith under inter-

national law, rendering the district court in New York without jurisdiction over them and requiring their release under *United States* v. *Rauscher*, 119 U.S. 407, and 18 U.S.C. 3192. The district court denied the petition on March 16, 1972. Petitioners appealed and moved for a stay of their trial, which was scheduled for May 16. The court of appeals ruled from the bench after argument on May 12 that the writ should not issue; accordingly it denied a stay and indicated that an opinion would follow (Pet. App. 2a-3a). Following a jury trial, petitioners were convicted on May 24. On June 19, 1972, they were sentenced to imprisonment for twenty-five years; an appeal from that conviction is presently pending in the Second Circuit.

In its opinion of June 12, 1972 (Pet. App. 4a-15a), affirming the denial of habeas corpus relief, the court of appeals held that, since comity was the basis for the extradition, the question whether the writ should issue under the principles of *Rauscher*, *supra*, depended on "whether the surrendering state would regard the prosecution at issue as a breach" (Pet. App. 12a). The court noted that the United States had requested Italy to broaden the extradition order to include the New York charges, but that no response had yet been received (Pet. App. 7a). Since the New York charges, although relating to a period subsequent to that covered by the Massachusetts indictment, were of the "same character as the crime for which [petitioners] were extradited," the court held that, absent an affirmative protest from Italy, comity had not been breached (see Pet. App. 13a-15a). The court indicated that its ruling would not preclude petitioners from raising the

point on the direct appeal of their convictions but that its holding would constitute the law of the case in the absence of new developments (Pet. App. 15a).

2. There have been a number of developments since the decision of the court of appeals. On July 12, 1972, the United States Embassy at Rome transmitted an inquiry from the Italian Ministry of Foreign Affairs requesting an explanation of petitioners' indictment and trial in the Southern District of New York.[1] The United States responded on August 17, 1972, in its Note Verbale No. 552 to the Italian officials; we are printing a copy of this response as Appendix A to this Memorandum, *infra*.

On October 4, 1972, the United States Embassy in Rome was informed that the Court of Appeals in Florence had acted with respect to the Note Verbale No. 736 of the United States, dated December 22, 1971 (Pet. App. 16a-18a), which had initially informed the Italian authorities of the Federal indictments in New York. The decision of the Florence court, a translated copy of which we are including as Appendix B, *infra*,[2] approved extension of extradition to include the offenses in the New York indictments. This decision is now pending before the Italian Ministry of Grace and Justice, which under Italian law must officially approve extradition decisions of the Italian courts. The Department of State has requested that the decision be

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[1] This is reprinted in Pet. App., at pp. 21a-23a.

[2] We are filing authenticated copies of this opinion with the Clerk of this Court.

expedited, but we are unable to determine when the Italian government will make its formal decision.[3]

If Italy officially extends extradition, the issue raised in the petition for a writ of certiorari—whether the indictment and trial of petitioners for offenses not mentioned in the extradition request is an act of bad faith by the United States depriving the trial court of jurisdiction—will no longer be present in the case. Nevertheless, we submit that certiorari should be denied without awaiting further developments. The petition here arises out of petitioners' application for a writ of habeas corpus prior to trial and conviction under the New York federal indictment. In denying habeas corpus, the court below stated that petitioners will not be precluded from raising the issue presented here "on an appeal from their convictions," although "this opinion will constitute the law of the case as far as this court is concerned * * * in the absence of any new developments, of fact or of law, that would call for a different conclusion" (Pet. App. 15a). Petitioners were thus permitted to preserve the claim on appeal from the criminal convictions. Petitioners have appealed their convictions and have raised the comity issue; oral argument before the Second Circuit is set for November 28, 1972. Therefore, the issue presented in this case has been sufficiently preserved in what is now the pertinent legal proceeding. Should the convictions be affirmed, petitioners will have the opportunity to reassert their comity argument in seeking review of any

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[3] We are informed that petitioners have appealed the decision of the Florence Court of Appeals to the Court of Cassation.

such decision. But by that time, it is likely that the Italian government will have acted formally on the extradition request, and the Court will then be in a position to determine whether the breach-of-comity claim is even viable.

We also add that, with respect to the Massachusetts indictment, petitioners have changed their pleas from not guilty to guilty and on October 24, 1972, were sentenced to nineteen years' imprisonment, to run concurrently with their New York sentences. Since petitioners are therefore lawfully under sentence of imprisonment regardless of the outcome of their present habeas corpus proceeding, there would be no prejudice to them in deferring consideration of the comity issue raised here until review is sought from the decision of the court of appeals on their pending criminal appeal.

For the foregoing reasons, the petition for a writ of certiorari should be denied.[4]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[4] In the meantime, as long as this case remains on the docket, we shall of course keep the Court apprised of any further developments in this matter.

APPENDIX A

Republic of Italy
Province of Rome
City of Rome
Embassy of the United States of America } SS:

I, Walter H. Hummel, Consul of the United States of America at Rome, Italy, duly commissioned and qualified, do hereby certify that the annexed copy of Note Verbale No. 552 dated August 17, 1972, transmitted by the Embassy of the United States of America to the Italian Ministry of Foreign Affairs, Rome, is a true and faithful copy of the original this day exhibited to me, the same having been carefully examined by me and compared with the said original and found to agree therewith word for word and figure for figure.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at Rome, Italy, this 17th day of August, 1972.

/s/ Walter H. Hummel
WALTER H. HUMMEL
Consul of the United States of America

[Seal]

No. 552

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to Note Verbale No. 099/2/35176 from the Ministry with a request for information concerning the criminal proceedings that have taken place against Jean Claude Kella and Charles Laurent Fiocconi in the United States District Court, Southern District of New York, since their extradition from Italy on or about October 6, 1971.

It is noted that the Ministry's Note Verbale characterizes the request made by the Embassy in its note No. 736 dated December 22, 1971 as a request for 'an extension of the subjects extradition' and that the note also refers to the Embassy's request as concerning 'a second extradition request'.

The Embassy's note No. 736 spoke of the intention of the United States Attorney for the Southern District of New York to seek charges against Messrs. Kella and Fiocconi additional to those for which their extradition for trial in the District of Massachusetts had been granted. The operative and last paragraph of the Embassy's note made reference to the language contained in Article XV of the new extradition treaty between the United States and Italy, which has yet to be signed and to come into force, in seeking to be informed whether the Government of Italy had any legal objection to the trial of Messrs. Kella and Fiocconi on the new and serious charges, similar to those in the District of Massachusetts, pending against them in the United States District Court, Southern District of New

York. The note was neither cast as a request for approval of extradition for this purpose nor was it intended to have that effect so far as the United States Government is concerned.

Messrs. Kella and Fiocconi were not extradited from Italy pursuant to the outstanding United States/Italian Extradition Treaty concluded on March 26, 1868, which does not list narcotic offenses, but rather pursuant to Italian municipal extradition law in view of the seriousness under the laws of both the United States and Italy of the narcotic offenses with which they were charged in the District of Massachusetts. When seeking extradition by reason of the law of the requested State rather than under an extradition treaty, the United States seeks generally to comply with the procedural provisions of its outstanding bilateral extradition treaty with the requested State if there is such a treaty. Even if that practice were extended in this case to apply the rule of speciality as set out in Article III of the 1868 Treaty, the language of both the Italian and the English texts provides that the person or persons extradited for enumerated offenses shall in no case be tried for any ordinary crime 'committed previously to that for which his or their surrender is effected'. It is noted that Article III by its own language is inapplicable when the person or persons have not been delivered up for crimes enumerated in Article II of the 1868 Treaty. However, even if the language of Article III were applied in the subject case despite its legal inapplicability, it would not bar the United States authorities from prosecuting Messrs. Kella and Fiocconi for offenses committed after those for which their extradi-

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tion was granted. As indicated in the Embassy's note No. 736, the offenses alleged to have been committed by the subjects in the Southern District of New York were committed on or about May 27, 1970, after those committed in the District of Massachusetts on or about September 15, 1968 until April 22, 1969 for which their extradition from Italy was effected.

The Embassy's note No. 736 was sent not because the Department of State believed that the approval of the Italian authorities was required for the prosecution of Messrs. Kella and Fiocconi on the new narcotic charges to be in compliance with the conditions of their extradition, but primarily to inform the Government of Italy of new developments as a courtesy in view of the language of the rule of speciality as set out in Article XV of the new treaty draft. Any legal objections raised by the Italian authorities were to be taken into consideration in light of all the relevant circumstances.

The Office of the United States Attorney for the Southern District of New York proceeded to seek and obtain an indictment against Kella and Fiocconi charging them with receiving, concealing, selling and facilitating the transportation, concealment and sale of approximately 37 kilograms of heroin in violation of Title 21, United States Code, Sections 173-174. Bail, initially set at $250,000 for each defendant, was subsequently reduced to $100,000 each; they were remanded to custody on failure to post bail. It was the original intention of the Office of the United States Attorney to delay actual trial until after receipt of a response by the Embassy to its note No. 736. However the rules applicable in the First Circuit [sic], which includes the

Southern District of New York, in implementation of the Constitutional requirement for a speedy trial, require that a person indicted be brought to trial within six months of his indictment. Failure to do so results in dismissal of the indictment. Upon dismissal of the indictment against Messrs. Kella and Fiocconi the bail set for them would have been exonerated and they would have been released.

It was the considered opinion of all those involved in this matter that the release of Messrs. Kella and Fiocconi on bail, regardless of the precautions that could and would have been taken, would have permitted them by reason of their wide connections and ample resources to flee from the United States and thus avoid prosecution not only on those charges pending in the Southern District of New York but also on the charges pending against them in the District of Massachusetts. It will be recalled that Messrs. Kella and Fiocconi were each able to meet $250,000 bail by surety bonds secured by a $500,000 certified check drawn on a Swiss bank, in order to obtain their release from custody on the charges pending against them in the District of Massachusetts. The trial in that District has been delayed by the defense tactics of both defendants. Moreover, at the time of the arrest of the subjects in Italy for extradition, both were found to have assumed identities, false documentation and large amounts of foreign currency. It was believed by the Department of State and the Department of Justice that the absence after five months of a response to the Embassy's courtesy request in the form of its note No. 736 should not by further delay be permitted to result in the dismissal of the

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indictment against Kella and Fiocconi and their consequent release, which in turn would in all likelihood have resulted in their escape from prosecution for the serious offenses of which they are suspected in both jurisdictions. It was considered that the Government of Italy would not wish the pending courtesy inquiry to bring about such a result.

The trial of the subjects in the Southern District of New York commenced on May 16, and resulted in their conviction on three counts on May 24, 1972. On June 19, 1972 they were each sentenced to 25 years imprisonment, and are presently appealing from the conviction, claiming, inter alia, that the United States, District Court in the Southern District of New York was without jurisdiction to try them as their extradition from Italy was only to stand trial for narcotics charges pending in the District of Massachusetts.

It is hoped that the above explanation of the rationale for the Embassy's note No. 736 and the action subsequently taken in the United States District Court for the Southern District of New York will prove satisfactory to the Government of Italy.

The Embassy avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurance of its highest consideration.

Embassy of the United States of America,

Rome, August 17, 1972.

Appendix B

Department of State
Division of Language Services
(Translation)

Italian Republic

In The Name Of The Italian People—The Preliminary Investigation Section Of The Court Of Appeal Of Florence, meeting in chambers, composed of:

Dr. Giuseppe Leone	Presiding Judge
Dr. Giovanni Remaschi	Judge
Dr. Luigi Leoncini	Judge

has pronounced the following

Judgment

in criminal proceedings against:

(1) Jean Claude Kella, born at Toulon, France, August 13, 1945;

(2) Laurent Fiocconi, born at Perpignan, France, March 31, 1941; for extension of extradition to the United States

notes

that, by a bill of indictment of February 22, 1972, the Public Prosecutor of this Court requested that proceedings be instituted to extend the extradition of the above-named, in accordance with the request of February 10, 1972, of the Ministry of Grace and Justice, which transmitted Note Verbale No. 736 of December 22, 1971 from the Embassy of the United States at

Rome, whereby the Government of Washington sought extradition for the crime of trafficking in narcotics committed in New York on May 27, 1970. Through a complete bill of indictment of May 8, 1972, the same Public Prosecutor pointed out that the aforesaid Note No. 736 from the Embassy of the United States, besides presenting a claim for extradition relating to the crime of trafficking in narcotics and specifically 37 kgs. of heroin, a crime committed May 27, 1970, in New York, as appears in formal indictment No. 70 of the District Court of the United States for the Southern District of New York, also concerned the charge of conspiracy, committed for the purpose of selling, receiving and distributing narcotics in violation of Article 21 and Articles 173 and 174 of the Code of the United States (activities having to do with heroin carried out at the start in March 1970), as indicated in indictment No. 71 of the District Court of the United States for the Southern District of New York and in the warrant of arrest, issued in this connection November 11, 1971. The Public Prosecutor therefore requested that the extradition proceedings, in addition to the substance of his request of February 22, 1972, be extended also to the charge of conspiracy mentioned above.

After the preliminary formalities had been completed, by a bill of indictment of June 22, 1972, summarizing the previous facts, the Public Prosecutor asked that extradition proceedings be instituted for the two aforementioned offenses. From a judicial standpoint, although the registered letters sent by the Public Prosecutor to the two accused men, inviting them to elect domicile, were returned unopened, the Prelim-

inary Investigation Section considers nonetheless that the hearing has been duly opened since the two accused, on May 10, 1972, appeared before the District Court of the United States for the Southern District of New York, were informed of the new procedure, which had been instituted before this Judicial Authority for the aforementioned purposes, and appointed their counsel, at whose addresses they elected domicile. Hence it is a matter of an act that is far more solemn and a more secure guarantee than a mere reply by letter, and it is sufficient to satisfy the procedural requirements of Article 177 bis of the Code of Criminal Procedure.

It should be pointed out that this Preliminary Investigation Section, by a decision made as early as February 8, 1971, handing down a judgment on a request from the same foreign authority, decided in favor of the extradition to the United States of America of French citizens Jean Claude Kella and Laurent Fioconi, who had been arrested in Ansedonia di Orbetello, being sought by Interpol under a warrant of arrest issued November 20, 1969, by Federal Judge Ford of the Federal District Court of Massachusetts, on the charge of trafficking in drugs (acts committed from September 15, 1968, to April 22, 1969).

In this particular case, therefore, it is a question of the assumption of "extension" of the aforesaid extradition (effected October 6, 1971), an assumption which, though not expressly provided for by the Code, is unanimously acknowledged by jurisprudence, so that the functional and territorial jurisdiction of this Preliminary Investigation Section, which normally is

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based on the place of arrest of the persons to be extradited, is now again linked with the earlier proceedings.

It might be remarked that, according to a literal reading of Article 3 of the Convention between Italy and the United States, implemented by Royal Decree of February 14, 1969 [sic. -1869], this extension procedure would be unnecessary because it is prohibited to prosecute "for any ordinary crime, committed *previously to* that for which his or their surrender is asked," while the events cited above are subsequent to those for which extradition was requested and granted.

Since, however, not only our code of criminal procedure but all the conventions arrived at subsequently among the various States, including the European Treaty of Extradition, enforced in Italy by Law No. 800, of January 30, 1963, prohibit prosecution for acts committed "before the surrender," and a provision of this sort is also contained in Article 15 of the new extradition treaty between the United States and our country, now being signed, the provisions contained in the old convention would be in conflict with the general principle of international law.

In this matter all the conditions for granting the request obtain. Even if the specific offenses for which extradition is requested are not included in Article 2 of the Convention, nevertheless sufficient indications of guilt remain to warrant permitting the commencement or continuation of criminal proceedings. Indeed, a specific and detailed charge of complicity has been brought against them as a result of a deposition made before a district court, and this session is not concerned with the importance which, according to foreign legis-

lation, seems to be attached to the full confession of a suspect, who also provides information implicating others, even to the extent of granting him immunity, since it is inappropriate here to give legal recognition to an institution which might prove to be contrary to the standards of law and order under our system, but rather to consider the degree of trustworthiness to be imputed to the "accuser" independently of his position as codefendant. Now, whereas on the one hand it is noteworthy that the reliability of the charges was recognized as sufficient to initiate proceedings, with the consequent issue of an arrest warrant, on the other hand it can not be believed that the charges were inspired solely by the aim of gaining immunity for himself since the accuser certainly could not escape the criminal consequences of a false accusation.

Furthermore, the above-mentioned charges, which in themselves already constitute grounds, even under our system, for instituting criminal proceedings (cf. Article 1 of the Italo-American Convention of March 23, 1868), are additional to other evidence, equally serious, consisting of the fact that Fiocconi and Kella were both in Italy, where they intended to live clandestinely, under false names, provided with false documents, and were found in possession of a considerable quantity of foreign currency, thus substantiating the indictment, which stated that a large part of the money obtained from the drug traffic was delivered to Fiocconi and Kella.

THEREFORE

THE PRELIMINARY INVESTIGATION SECTION of the Court

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of Appeal of Florence; In consideration of Article 667 of the Code of Criminal Procedure,

decides

in favor of the extension of the extradition awarded by judgment of February 8, 1971, and executed October 6, 1971, with respect to French citizens Jean Claude Kella and Laurent Fiocconi, an extension which now includes the offense of dealing in 37 kgs. of heroin, an offense committed May 27, 1970, in New York, and the offense of conspiracy committed in order to sell, receive and distribute narcotics, activities begun in March 1970, according to formal indictments Nos. 70 and 71 of the District Court of the Southern District of New York, and in accordance with the requests of December 22, 1971, and April 19, 1972, of the Washington Government through the Embassy of the United States at Rome.

☆ U.S. Government Printing Office: 1972—488-700/304